

National Labor Relations Board Professional Association

Members of the Board:

This comment is submitted in response to the National Labor Relations Board's recent Request for Information concerning its Representation Case Rules (docket # NLRB-2017-0001). The National Labor Relations Board Professional Association's (NLRBPA) members are labor professionals with extensive experience applying and resolving cases under the new Rules.¹ The views stated herein are those of the NLRBPA and not those of its individual members, nor do they represent the views of the National Labor Relations Board or any division, office or branch thereof.

As neutrals, the NLRBPA's members have no vested interest in advancing the cause of either labor unions or management. This comment is submitted with the object of setting forth nonpartisan, objective principles which should govern any effort by the Board to further modify its Rule on representation cases. Those principles, which we do not think anyone could find objectionable, are:

- Commit to conducting and publishing a full retrospective review of the existing Rule prior to, or with, any Notice of Proposed Rulemaking, and make the data underlying that review publicly available.
- Rely on data, not anecdotes.
- Change rules only where there are documented problems with the existing rules, or good reasons to think that the change will improve case processing.
- Set bright-line rules where—and *only* where—there is good reason to believe that flexible standards are inappropriate.
- Carefully avoid creating perverse incentives for misbehavior.

We additionally note that a failure to abide by these principles may result in gross waste of public funds. If the Board makes significant changes to its representation-case rules that are subsequently judicially overturned as arbitrary and capricious, hundreds of representation case decisions issued during the time period when the invalidated rules were in place could be retroactively invalidated, potentially creating chaos for regulated parties and requiring inordinate amounts of Board agents' work time to sort out. The Board has a great deal of recent, lamentable experience with the need to vacate and re-do hundreds of decisions because of erroneous interpretations of the National Labor Relations Act and

¹ 79 Fed. Reg. 74308 (Dec. 15, 2014).

Constitution.² Those missteps resulted in severe harm to the public fisc. The NLRBPA strongly advises the Board to adhere to the five principles described above to minimize the foreseeable risks of hasty, ill-informed decisionmaking.

With that stated, we turn now to a fuller explication of the principles we believe the Board should commit to following.

Conduct a retrospective review before determining whether to make changes to the Rule, and make the data available to the public.

In the past few decades, there has been an increasing scholarly and regulatory consensus that federal agencies should increase their use of retrospective review, in which agencies study the functioning of existing rules and regulations to determine whether they are working correctly or not.³ Without retrospective review, agencies cannot make informed choices about changes to existing policies; they are merely guessing at the effects of those policies. Indeed, Member Kaplan spoke positively about the value of retrospective review in his written submissions to the Senate's HELP Committee prior to his confirmation vote.

In the Final Rule, the majority and dissent extensively discussed predictions about the future of litigation under the Rule.⁴ A key question, therefore, would seem to be which of those predictions have proven accurate, and which have not. So far, however, the Board's efforts at retrospective review of the Rule have been limited.

² *NLRB v. SW General*, 137 S. Ct. 929 (2017) (four decisions vacated, dozens of others forced to be ratified by General Counsel due to erroneous interpretation of the Federal Vacancies Reform Act); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (approximately 100 decisions vacated due to erroneous interpretation of the Appointments Clause); *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010) (over 100 decisions vacated due to erroneous interpretation of the Board's quorum provisions).

We note, parenthetically, that those errors were not necessarily foreseeable, nor were they the fault of the Board. In all three instances, the Board acted in accordance with binding guidance from the Justice Department's Office of Legal Counsel. We cite them only to show that procedural errors of the sort we caution against can result, and have resulted, in severe waste of funds.

³ See Administrative Conference of the United States, *Administrative Conference Recommendation 2014-5: Retrospective Review of Agency Rules*, 79 Fed. Reg. 75114 (Dec. 17, 2014), and works cited therein.

⁴ See, e.g., 79 Fed. Reg. at 74373 (majority predicts Rule's designation of standard hearing date 8 days from filing of petition will not impair employers' ability to adequately conduct hearings); *id.* at 74431 (predicting that that requirement will deny employers due process).

In April 2016, the Board published preliminary statistics on the first year under the Rule.⁵ But we now have access to nearly three times the sample size of the data set that was analyzed in that initial brief study, and can also assess certain additional questions (such as the prevalence of test-of-certification challenges) which would have been difficult to do with only a year's data.

Accordingly, we urge the Board to publish updated statistics on, at the very least, several key metrics under the Rule—case processing times, win rates, settlement and litigation rates, and the frequency with which certifications are tested. Additionally, in the event that the Board decides to issue a notice of proposed rulemaking, we urge the Board to publish its raw data and provide adequate time for analysis of that data, so that commenters who wish to examine the data in new ways, or analyze different questions, can do so.

Make decisions based on data, not just-so stories.

Related to the first point, since 2015, there have been something like 7000 representation petitions filed and processed under the new rules. In any sample this large, there will be some oddball results, and probably some number of outcomes that the reviewer or commenter disagrees with.

Such complaints are not necessarily sufficient, however, to warrant changes in the Rule. The Board must resist the temptation to cherry-pick anecdotes that run contrary to the weight of the evidence. Claims about the Rule—both pro and con—should be rigorously tested against the data to determine whether they are supported by objective evidence. Anecdotes have their place in the rulemaking process, but that role is to suggest new ways of analyzing the facts, not to substitute for that analysis.

Change rules only where—and if—there is a good reason to.

We understand that the Board's new membership is not the same as its prior membership. Different administrations have different priorities. But the law is perfectly clear on this point—when an agency determines to reverse its prior decisions, that decision, no less than the original decision, must be rational and supported by evidence in the record.⁶

⁵ NLRB Office of Public Affairs, *Annual Review of Revised R-Case Rules*, <https://www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules> (Apr. 20, 2016)

⁶ *FCC v. Fox Television Studios, Inc., et al.*, 556 U.S. 502, 515-16 (2009) (when changing course, “the agency must show that there are good reasons for the new policy” and, where factual findings conflict with those underlying prior rulings,

It is, therefore, not sufficient simply to state that one is changing policy because it was implemented by one's predecessors. Equally so, the Board must not make the mistake of treating the Rule as some type of monolith, rather than serial, largely-unconnected attempts to improve representation-case procedures. Whether a particular change has positively impacted case-processing has nothing to do with the mere fact that it was proposed by the prior Board or is a part of the Rule.

Indeed, as that Board explained, many of those proposals, most notably the elimination of the 25-day automatic stay of election in any case where a hearing was held, were effectively uncontested by the dissent or the comments.⁷ Where the prior rulemaking process shows consensus, there is no warrant for the new Board to revisit those determinations. Proposals advanced by certain commenters asking the Board to rescind the Rule in its entirety, therefore, are (virtually by definition) asking it to take an arbitrary and capricious act.

Put faith in regional staff and avoid imposing dogmatic bright-line rules in situations where those rules are not warranted.

Scholars of administration have written extensively on the topic of choosing between rules (e.g. "a motion to dismiss must be filed within 21 days of the complaint") and standards (e.g. "a motion to dismiss must be filed within a reasonable time of issuance of the complaint").⁸ Broadly speaking, the advantages and disadvantages of each are well-understood. Rules are clearer and less costly to apply, but can produce unfair or arbitrary results at times. Standards invite litigation, but allow decisionmakers to be flexible in response to circumstances.

It would be fair to say that the Rule, by and large, expressed a preference for standards over rules in representation-case decisionmaking. It empowered Regional Directors to defer litigation of nonessential issues to after an election has been held, codified their authority to determine the "earliest practicable date" on which an election can be held, and where it set deadlines or presumptions (such as the presumption that pre-election hearings will be held eight days after a notice of

explain its resolution of the conflict, though the agency's *overall* burden is not heightened).

⁷ 79 Fed. Reg. at 74410 (noting that "there is near consensus that [the 25-day automatic stay period] serves little purpose"); 74430 (noting that there was no substantive disagreement among Board members that the 25-day stay period lacked support).

⁸ We cannot begin to canvass this extensive literature here. For extensively cited exemplar articles, see, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992), and Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985).

hearing has been served), authorized Regional Directors to vary from those presumptions in appropriate circumstances. This is not to say that the Rule contained absolutely no hard-and-fast rules,⁹ but to the extent that it had an overarching principle, it was to empower the Board's professional staff in the field with the tools needed to process representation cases as efficiently as possible.

Thus, in any situation where it suggests that flexible standards should be replaced by rules (or vice versa, for that matter), the Board owes the public an explanation of precisely why it has balanced the costs and benefits of the two approaches as it has.

Avoid creating perverse incentives.

Finally, in any type of rulemaking process, the decisionmaker must think carefully about whether any aspect of its proposals has the potential to create perverse incentives for bad behavior, or other unintended consequences. If rules incentivize parties to engage in destructive or unprofessional behavior, those rules need to be altered.¹⁰

In its 2014 decision on the Rule, the prior Board focused on the elimination of three perverse incentives in representation cases—the incentive created by the prior rules to litigate issues at pre-election hearings that had no bearing on the actual question at hand as a delaying tactic, the incentive to litigate more-or-less *any* issue, or at least threaten to do so, in order to reap the benefit of the 25-day automatic stay accompanying any contested Decision and Direction of Election, and the incentive to file factually unsupported blocking unfair labor practice charges as a means of delaying elections that the charging party feels itself unlikely to prevail in.¹¹ We applaud this goal. The Board's object should be to reduce, and to the extent

⁹ For instance, the Rule retained a preexisting bright-line doctrine that an employer's objected-to failure to provide nonemployer parties with available employee contact information requires the rerunning of an election. 79 Fed. Reg. at 74357.

¹⁰ The Board must be particularly careful not to incentivize bad-faith litigation tactics because of court cases that have held that it lacks authority to force parties—even parties who have openly abused and made a mockery of the Board's processes—to compensate opposing parties or the federal taxpayer for the consequences of their behavior. *E.g. HTH Corp. v. NLRB*, 823 F.3d 668, 679-81 (D.C. Cir. 2016).

¹¹ 79 Fed. Reg. at 74385-86 (critiquing prior law which encouraged litigation of issues that did not need to be decided in preelection hearings); *id.* at 74410 (critiquing prior rules' encouragement of parties to go to hearing, or threaten to do so, in order to invoke the 25-day automatic stay and its attendant delay); *id.* at

possible to eliminate, any potential conflict between attorneys' ethical duties to advance their clients' interests and their obligations to practice in a professional manner.

One can debate, as an empirical matter, whether the Rule succeeded in its goal of eliminating perverse incentives in representation cases. What cannot be debated is that that goal is worthwhile, and that the re-creation of perverse incentives would seriously undercut the rationale for any proposed changes. The Board must focus carefully on the anticipated practical effects of any changes to the Rule, and cannot simply assume that parties will sacrifice their own interests to maintain professionalism.

Conclusion

The principles outlined above should guide any effort by the Board to reconsider the Rule. Regardless, however, we fully intend to speak out in opposition to any effort to alter or amend the Rule that does not meet rigorous standards of administrative rationality. Employees in this nation—the Board's ultimate clients—deserve no less.